



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

Henry & Graham & Hawthorne, of Tazewell, for plaintiff in error.

Greever & Gillespie and *Harman & Pobst*, all of Tazewell, for defendants in error.

NORFOLK & W. RY. CO. *v.* WARDEN.

Sept. 9, 1915.

[86 S. E. 103.]

1. Carriers (§ 380*)—Ejection of Passengers—Issues, Proof, and Variance.—The variance between a declaration, alleging that plaintiff, while intoxicated, boarded a train as a passenger, and that after the train started the trainmen, knowing his condition, ejected him and threw him to the ground, dislocating one of his hips, leaving him in a dangerous place, and the proof, failing to show that he was thrown from the train and thereby injured, but merely showing that he was negligently left in an unsafe place, and as a proximate result wandered in the dark until he fell from a trestle and sustained the injuries complained of, was material, and a motion to exclude the testimony as to the danger of the place should have been sustained.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1464-1466, 1469, 1470, 1472; Dec. Dig. § 380.* 2 Va.-W. Va. Enc. Dig. 711.]

2. Trial (§ 412*)—Motion to Exclude Evidence—Demurrer to Evidence—Waiver of Objection to Evidence.—A defendant, who demurred to the evidence after the overruling of his motion to exclude it because not admissible under the declaration, did not thereby waive the objection to the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 182, 974-977; Dec. Dig. § 412.* 4 Va.-W. Va. Enc. Dig. 517.]

3. Appeal and Error (§ 1178*)—Decision—Reversal.—Where the variance between the declaration and the proof was material, and the court overruled a motion to exclude the evidence, and overruled a demurrer to the evidence, subsequently interposed, the court on writ of error will reverse the judgment for plaintiff and remand the case, to afford him an opportunity to amend the declaration to conform to the proof, as authorized by Code 1904, § 3384.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4604-4620; Dec. Dig. § 1178.* 13 Va.-W. Va. Enc. Dig. 484.]

4. Damages (§ 59*)—Mitigation—Intoxication.—That a person sustaining a personal injury was intoxicated at the time cannot be invoked in mitigation of damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 108-112, 114, 117, 118; Dec. Dig. § 59.* 4 Va.-W. Va. Enc. Dig. 410.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

Error to Circuit Court, Pulaski County.

Action by David Warden against the Norfolk & Western Railway Company. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

J. C. Wysor, of Pulaski, for plaintiff in error.

E. L. Trinkle, of Wytheville, and *Jno. S. Draper*, of Pulaski, for defendant in error.

PERDUE *v.* STARKEY'S HEIRS.

Sept. 9, 1915.

[86 S. E. 158.]

1. Wills (§ 531*)—Construction—Per Capita Distribution.—A bequest to persons who are living and to children of another who is dead presumptively refers to the children as individuals and not as a class, and the children take the same share per capita with those persons who are living, and the relations between the beneficiaries and the operation of the statute on those relations in case of intestacy do not overcome the presumption that a per capita distribution was intended.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1143, 1144, 1148-1152; Dec. Dig. § 531.* 13 Va.-W. Va. Enc. Dig. 822.]

2. Wills (§ 531*)—Construction—Per Capita Distribution.—A husband and wife executed to a will whereby they made specific legacies, and then gave to persons named and the daughters of another person their estate, "to be equally divided between them." The beneficiaries bore different degrees of relationship to each other and to the husband and wife. Held, that the estate must be divided per capita among the beneficiaries.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1143, 1144, 1148-1152; Dec. Dig. § 531.* 13 Va.-W. Va. Enc. Dig. 821.]

Appeal from Circuit Court, Roanoke County.

Suit between one *Perdue* and *Starkey's* heirs, involving the construction of the joint will of *John C. Starkey* and his wife. There was a decree construing the will, and certain parties appeal. Reversed.

Samuel A. Anderson, of Richmond, and *Jno. P. Lee*, of Rocky Mount, for appellant.

Martin & Chitwood and *Coxe & Cocke*, all of Roanoke, and *E. W. Saunders*, of Rocky Mount, for appellee.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.